2008

Robert Keal v. Edwin Ray Okelberry : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROBERT KEARL, Appellant, vs. EDWIN RAY OKELBERRY, Appellee.	Case No. 20080301

APPEAL FROM A JUDGMENT ON JURY VERDICT
THE HON. GARY D. STOTT
FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

BRIEF OF APPELLEE

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LIST OF PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are identified in the caption on appeal. A former defendant, Johnson Corporation, was voluntarily dismissed from the case prior to trial and is not involved in this appeal. (R. 720-721.)

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JURISDICTION

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78A-4-103(1)(j).

ISSUES PRESENTED FOR REVIEW

ISSUE 1. Does Mr. Kearl's failure to cite and argue applicable standards of review in his brief preclude appellate review?

Preservation: This issue arose in Mr. Kearl's brief on appeal.

Standard of review: The requirement that an appellant identify the applicable standard of review for each issue with supporting authority is set forth in Utah Rule of Appellate Procedure 24(A)(5). Briefing of an issue is inadequate when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court. *State v. Sloan*, 2003 UT App 170, ¶ 13, 72 P.3d 138.

ISSUE 2. Has Mr. Kearl shown that the trial court abused its discretion by declining to ask plaintiff's voir dire questions regarding alcohol use?

Preservation: This issue has not been preserved for appeal. Although Mr. Kearl submitted a list of proposed questions, including questions regarding alcohol use (R. 565-567), he has not provided a transcript of the argument regarding voir dire, and there is no other indication in the record that he argued a legal basis for the questions and, if so, upon what stated grounds. Accordingly, Mr. Kearl cannot demonstrate that he raised his present argument in the court below. See *O'Dea v. Olea*, 2009 UT 46, ¶¶ 15, 18-19, --- P.3d ---- ("To properly preserve an issue at the district court, the following must take place: '(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority.'").

Standard of review: Challenges to a trial court's management of jury voir dire are reviewed for abuse of discretion. *Depew v. Sullivan*, 2003 UT App 152, ¶ 13, 71 P.3d 601.

ISSUE 3. Has Mr. Kearl shown an abuse of its discretion by the trial court denying his motion for a new trial based upon alleged juror misconduct?

3.A. Were all or portions of the affidavits of Kay Armstrong and Mr. Kearl's counsel inadmissible or otherwise improper for consideration in Mr. Kearl's motion for new trial?

Preservation: This issue was preserved in the parties' briefing regarding appellee Okelberry's motion to strike the affidavits (R. 827-837, 866-872.)

Standard of review: Whether the affidavits were inadmissible is a question of law reviewed *de novo*. *Brown v. Jorgensen*, 2006 UT App 168, ¶¶ 19-20, 136 P.3d 1252.

3.B. Has Mr. Kearl shown an abuse of discretion in any event?

Preservation: This issue was addressed in connection with Mr. Kearl's motion for new trial (R. 802-806, 810-820, 838-855). However, Mr. Kearl has not provided a transcript of the trial testimony that he claims would have triggered or implicated the juror's alleged bias. Consequently, this issue has not been preserved on appeal.

Standard of review: The denial of a motion for new trial is reviewed for abuse of discretion. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991). Because the trial court did not address the elements of the *McDonough* test that governs alleged voir dire misconduct, both prongs of the test are reviewable by this Court as a matter of law. *State v. Redding*, 2007 UT App 350, ¶ 17 n.4, 172 P.3d 319.

ISSUE 4. Has Mr. Kearl shown an abuse of discretion by the trial court in denying a motion for new trial based upon alleged attorney misconduct involving exhibit 38?

Preservation: This issue was partially preserved. Mr. Kearl objected on the grounds of timeliness, but did not object on the grounds that the questions violated the privacy of third persons until after the examination had concluded. (R. 948, pp. 7-8.)

Standard of review: This issue is reviewed for abuse of discretion. *Hales v. Oldroyd*, 2000 UT App 75, ¶¶ 15-16, 999 P.2d 588 ("Trial courts have broad discretion in determining discovery sanctions because trial courts must deal first hand with the parties and the discovery process"; abuse must be "clearly" shown); *G. M. Leasing Co. v. Murray First Thrift & Loan Co.*, 534 P.2d 1244, 1245 (Utah 1975) (court has discretion with regard to alleged violation of court order); *Vanderpool v. B. K. Hargis*, 23 Utah 2d 210, 461 P.2d 56 (court has discretion in control of counsel and the trial).

In addition to abuse of discretion, the appellant must demonstrate, "from the totality of the evidence," that the alleged misconduct was "substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result." *State v. Tenney*, 913 P.2d 750, 755 (Utah App. 1996).

ISSUE 5. Has Mr. Kearl shown an abuse of discretion by the trial court in denying his motion in limine to limit the testimony of the defendant's expert, and in precluding him from informing the jury that the expert was paid by a liability insurance company?

Preservation: These issues were raised in the trial court through Mr. Kearl's pre-trial motions in limine (R. 229-287). However, they have not been preserved for

purposes of appeal, because Mr. Kearl has not provided a sufficient record to permit review. *See* p. 38, *infra.*

Standard of review: The trial court has "considerable" discretion in deciding whether to admit or exclude expert testimony, including whether adequate foundation has been laid and limitations on cross examination. *State ex rel. G.Y. v. State*, 962 P.2d 78, 83 (Utah App. 1998); *State v. Clayton*, 646 P.2d 723, 726 (Utah 1982); *Shurtleff v. Jay Tuft and Co.*, 622 P.2d 1168, 1173 (Utah 1980); *Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶ 24, --- P.3d ----; *State v. Tucker*, 2004 UT App 217, ¶ 12, 96 P.3d 368; *Paulos v. Covenant Transport, Inc.*, 2004 UT App 35, ¶ 20, 86 P.3d 752. A trial court's decision to admit or exclude evidence under U.R.E. 403 is "toward the broad end of the spectrum" of discretion. *State v. Lindgren*, 910 P.2d 1268, 1271 (Utah App. 1996).

In addition to an abuse of discretion, the appellant must demonstrate that the alleged error was substantial and prejudicial to the extent that, without the error, there is a reasonable likelihood of a different outcome. *Lamb v. Bangart*, 525 P.2d 602, 610 (Utah 1974); U.R.E. 103 ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected").

ISSUE 6. Has Mr. Kearl shown an abuse of discretion by the trial court in declining to instruct the jury regarding alcohol use as a pre-existing condition?

Preservation: Mr. Kearl took exceptions (R. 948, pp. 27-28) to the trial court's decision not to give instruction nos. 18 and 24 (R. 584, 578). However, he has not preserved the issue on appeal, because he has not provided a trial transcript, and has not

pointed to evidence introduced at trial that would have supported the giving of such an instruction. *See Orem City v. Longoria*, 2008 UT App 168, ¶ 6 and n.1, 186 P.3d 958.

Standard of review: A trial court's ruling concerning a jury instruction is reviewed for correctness. *Paulos v. Covenant Transport, Inc.*, 2004 UT App 35, ¶ 10, 86 P.3d 752. However, an appellant has a duty to show that "there [was] competent evidence to support" the instruction. *Id.*, ¶¶ 11, 27; *State v. Low*, 2008 UT 58, ¶¶ 25, 27, 29, 192 P.3d 867. The appellant must also show that the failure was prejudicial, *i.e.*, that "there is a reasonable likelihood that, absent the error, there would have been a result more favorable to the complaining party." *Jenkins v. Jenkins*, 2008 UT App 454 *2 (unpublished), citing *Tingey v. Christensen*, 1999 UT 68, ¶ 16, 987 P.2d 588.

Issue 7. Did the trial judge abuse his discretion or otherwise err in not recusing himself?

Preservation: Mr. Kearl did not preserve this issue in the court below. He participated in the proceedings for several months, including filing a motion for new trial, after being on notice of the alleged grounds for disqualification. Additionally, although Mr. Kearl filed a motion for disqualification in the trial court (R. 880-888), he withdrew it before any court action was due. (R. 925-928.)

Standard of review: The standard of review for this issue is unclear, and is addressed *infra*, pp. 43-45.

DETERMINATIVE STATUTES AND RULES

U.R.Civ.P. 63(b)(1):

> (A) A party to any action or the party's attorney may file a motion to disqualify a judge. The motion shall be accompanied by a certificate that the motion is filed in good faith and shall be supported by an affidavit stating facts sufficient to show bias, prejudice or conflict of interest.
>
> (B) The motion shall be filed after commencement of the action, but not later than 20 days after the last of the following.

Utah Code of Judicial Conduct Canon 3(E)(1):

> A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> E.(1)(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

Plaintiff Robert Kearl filed a negligence suit against defendant Edwin Okelberry on May 20, 2005, alleging that on September 8, 2001, while Mr. Kearl was helping Mr. Okelberry move a trailer, the trailer fell on him. (R. 2-3.) From November 5-9, 2007, the case was tried to a jury, which found that Mr. Okelberry was not negligent. (R. 786-788.) Accordingly, the jury did not reach the issue of damages. *Id.*

The trial court's judgment on the jury verdict was entered December 3, 2007. (R. 799-801.) On December 10, 2007, Mr. Kearl filed a motion for a new trial, and for sanctions against Mr. Okelberry's attorney for alleged misconduct relating to the handling

of a trial exhibit. (R. 802-803.) Mr. Kearl's motion was accompanied by affidavits of one of the jurors and of Mr. Kearl's counsel purporting to convey statements by one of the jurors. (R. 804-820.) Mr. Okelberry opposed the motion for new trial, and moved to strike all or portions of the affidavits. (R. 827-855.)

The post-trial motions were heard February 20, 2008. (*See* R. 949.) At the conclusion of the February 20 hearing, Judge Stott stated an intent to deny the motion for new trial. (R. 949, pp. 13-18.) Two days later, Mr. Kearl filed a motion to disqualify Judge Stott, claiming that the judge had engaged in improper *ex parte* contact with Mr. Okelberry's counsel three months earlier. (R. 880-888.) Before any court action was due, Mr. Kearl acknowledged that his motion was untimely, and withdrew it. (R. 925-928.) In his "Withdrawal of Motion to Enter Disqualification," Mr. Kearl's counsel suggested that the judge disqualify himself *sua sponte*. (R. 925-928.)

On March 12, 2008, the trial court denied Mr. Kearl's motion for new trial.[1] The court did not rule on Mr. Okelberry's motion to strike the affidavits submitted by Mr. Kearl. (R. 925-935.) Mr. Kearl timely appealed on March 28, 2008. (R. 939-940.)

Statement of facts

Except for a few isolated portions, there is no trial transcript, and Mr. Kearl's statement of facts is supported by citations to pretrial filings and memoranda. Accordingly, Appellee Okelberry has done the same, except as otherwise noted.

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[1] The court signed alternative orders submitted by both parties. (R. 929-935.)

Facts relating to plaintiff's proposed voir dire regarding alcohol use

Prior to trial, Mr. Kearl submitted proposed voir dire consisting of 65 questions. (R. 563-577). Three proposed questions related to alcohol use:

63. Do you drink alcohol? Yes _____ No _____

64. Does any member of your family drink alcohol? Yes _____ No _____

65. Would you have a hard time being impartial toward a party if they drink alcohol? Yes _____ No _____ If "yes," please explain: _____
_____

(R. 566.)

Mr. Kearl contends that the trial court erred by not giving these instructions. (The record does not contain a final version of the court's voir dire questions, and Mr. Kearl did not order a transcript of the voir dire, except for follow-up questioning of juror W. Gary Harward (R. 948, pp. 3-4). Accordingly, the record does not reflect which of the parties' proposed questions were or were not asked.)

Facts relating to alleged juror misconduct

The first morning of trial, Monday, November 5, 2007, each member of the jury pool was given a Prospective Jury Questionnaire to complete. Prospective jurors filled out the questionnaire before entering the courtroom, and prior to introduction of the

parties and attorneys. At that time, they had no information about the case, other than that it involved "an accident." (Question 12.)[2]

After completion of the questionnaires, and appropriate time for counsel to review the completed forms, the jury pool was brought into the courtroom and the court conducted its own, additional *voir dire*. Counsel were thereafter afforded an opportunity to request individual questioning, in Chambers, of any prospective juror from whom they wanted additional information. (R. 853-854.) At the defendant's request, prospective juror W. Gary Harward was called into chambers and asked some follow-up questions. (R. 948, pp. 3-4.) The court asked Mr. Kearl's counsel if he had any questions of Mr. Harward, and he said no. (*Id.*, p. 4.)

Question 8 on the jury questionnaire asked: "Do you believe you have a valid reason that would make it difficult for you to serve as a juror? If necessary, the Judge can discuss this with you privately." Mr. Harward answered, "No." Question 10 asked: "If you were in the position of either party, would you feel comfortable with yourself as a juror? If not, please explain." Mr. Harward answered, "Yes." (R. 819, 853.)

After hearing the evidence, the jury returned a verdict that the defendant, Mr. Okelberry, was not negligent. Because the jury found no liability, it did not reach the

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[2] The questionnaires themselves did not end up in the trial court's record; however, their pertinent content and Mr. Harward's responses were undisputed in briefing below. (R. 819.) Question 12 asked, "Have you ever been injured in an accident?" From that, jurors might reasonably infer that the case involved an accident of some sort. (R. 854-855.)

question of damages. (R. 786-788.) Polling confirmed that the verdict was agreed upon by six of the eight jurors. (R. 789.)

In conjunction with his motion for a new trial, Mr. Kearl submitted an affidavit of Kay Armstrong, Juror No. 17 and the jury foreperson at trial. (R. 810-813, 853.) (Ms. Armstrong was one of two jurors who, when polled, said that she did not agree with the verdict.) (R. 789, 853.)

Ms. Armstrong's affidavit purported to summarize isolated comments or actions of Mr. Harward during deliberations. (R. 810-813, 853.) Ms. Armstrong also claimed that she "saw prejudice" on the part of other unnamed jurors. (R. 813, 853-854.)[3]

Mr. Kearl also submitted an affidavit of his counsel, Denton M. Hatch (R. 804-806), recounting a brief telephone conversation in which Mr. Harward declined to discuss the trial with him, but said he felt he had "help" in making his decision. (R. 827-836.)

Facts relating to alleged attorney misconduct regarding Exhibit 38

On the third day of trial, defendant's counsel, Ruth Shapiro, questioned one of Mr. Kearl's damages witnesses, Dr. Ron France. (R. 768-769, 948, pp. 5-10.) Intending to elicit information that Dr. France's recommendations were essentially the same for all

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[3] Ms. Armstrong's accusation of impropriety by her fellow jurors seemed somewhat ironic. It was undisputed below that, during one break in the trial, Ms. Armstrong ignored the court's repeated instruction not to speak to the parties, and told Ms. Shapiro's paralegal to tell Ms. Shapiro that she should wear a blue suit the next day. Upon learning of the contact, Ms. Shapiro notified the court. Ms. Armstrong was brought into chambers, where she admitted her misconduct and was admonished. (R. 766.)

plaintiffs, Ms. Shapiro's questioning included the use of an exhibit, described more particularly below. The Court found the content of the exhibit to be proper, but that the way the exhibit was presented was not. (R. 948, p. 17.) The partial transcript reflects the following sequence of events:

a) As Ms. Shapiro began the questioning, she marked an exhibit (which had an accompanying blowup) as Exhibit 38. (R. 948, p. 5.)

b) The exhibit contained three sections. At the top, counsel summarized the treatment regimen that Dr. France recommended for Mr. Kearl. Below that information, counsel summarized the recommendations made by Dr. France for litigants in two other cases. For purposes of cross-examination, counsel had covered the lower two summaries with sheets of paper, so that she could walk the expert through the recommendations one at a time. (R. 948, p. 19.)

c) As counsel began this line of questioning, Mr. Hatch objected that he had not previously seen the exhibit. Ms. Shapiro showed the exhibit to the court, stating, "It's a rebuttal exhibit, your Honor." She then added, "There's information underneath that will serve as (inaudible)." (R. 948, pp. 5. 7, 14; *also id.*, p.12 (Mr. Hatch acknowledging that Ms. Shapiro said there was "something under this paper").) Because the bottom portions were covered, their content was not visible. The court overruled Mr. Kearl's timeliness objection. (R. 948, pp. 16-19.)

d) Ms. Shapiro then stated again that there was additional information below the summary of Mr. Kearl's treatment recommendation: "In all fairness, your

Honor, there is more information underneath that I'm going to get into." (R. 948, p. 5.) However, to counsel's regret, and for which she later apologized, she did not clarify to the court what the additional information was Specifically, counsel did not explain that the additional information related to recommendations made for two litigants other than Mr. Kearl. When that became apparent, the court understandably became concerned. The exhibit was turned toward the witness, and could not be seen by the court. Consequently, as the questioning unfolded, the court had no way of knowing whether counsel was about to reveal inappropriate information about non-parties. (R. 948, pp. 16-18.)

e) Ultimately, the court determined that the covered portion of the exhibit did not contain inappropriate information as it feared. (R. 948, pp. 17-18.)

f) As the cross-examination moved to the second example, plaintiff's counsel again objected on the basis that the exhibit had not been timely disclosed. (R. 948, pp. 7-8.) The court overruled the objection, stating, "It's proper cross-examination, rebuttal of the witness' testimony and in comparison with respect to what he's done with -- with regard to similar situations and treatment recommendations." (R. 948, p. 8.) Mr. Kearl did not object to the exhibit's content. (R. 948, pp. 5-10.)

g) The exhibit used only the initials of the third parties, and Ms. Shapiro instructed the witness not to disclose any names. (R. 861; R. 948, pp. 6-7, 13, 14, 18.)

h) It was undisputed that the entire line of questioning, including Mr. Hatch's objections, lasted 4 minutes and 20 seconds. (R. 849, citing trial disk 13/18, 5:23-9:43). Mr. Kearl's counsel had an opportunity to redirect.

i) The next day, before the jury was brought in, Mr. Kearl's counsel brought up Exhibit 38. At this time, he first disclosed publicly the name of one of the other two litigants, Karen Green, also a client of his. (R. 948, p. 12.) Counsel asked for an order withdrawing the exhibit and instructing the jury to ignore the exhibit and that it should not have been presented to them. (R. 948, pp. 13-14)[4]

j) In response, the court initially observed, "I think it's fair to say that there have been on both sides untimely disclosure and exchanges of information in this case." However, the court said it felt deceived by defense counsel's failure to disclose that there was additional information below the top portion of the exhibit. (R. 948, pp. 16-17.)[5]

k) After extensive argument (R. 948, pp. 12-24, 28-30), the court made two rulings. First, it found that the line of questioning itself, and the information about Dr. France's recommendations for other litigants, was proper cross examination fodder:

> As to the information that was discussed, that information is appropriate. Expert witnesses can be confronted about their prior participation, about the -- about testimony and recommendations they made in the case that's before the court and

---

[4] Mr. Kearl's counsel told Ms. Green that Ms. Shapiro had presented her "full name to the jury and everyone in the Court room." (R. 807-809, ¶ 5.) Mr. Kearl now concedes that is not true.

[5] As noted above, before using the exhibit, counsel did indicate that additional information was contained beneath the top portion. However, counsel's meaning might not have been clear, or the court might not have heard counsel. During a subsequent discussion, the court said it did not recall counsel indicating that there was more information beneath the top portion. "Now, that's been a few days ago; you may be right. But my recollection was that this exhibit is being used for rebuttal purposes, and there was never a reference of any nature of any kind going to a bottom portion of information on that document." (R. 948, p. 19.)

how it's exactly the same as it's been in other situations with other people; fortunately, one of the -- one of the things that I was really nervous about, real nervous, since I couldn't see what it was, it was on the easel in front of the jury, its back was to me, was whether it had any names on it or not. There was no – there was no way for Mr. Hatch to know what was on it. I had absolutely no idea what was going to happen with it until it happened. Fortunately, it didn't have names on it, so it didn't show persons, it didn't show identification information in any fashion. I looked at that --

Hatch: It did show initials.

Court: I --

Hatch: It did show the plan.

Court: It did show the plan, and that's the kind of information that counsel opposing an expert witness like this is entitled to talk about, but I -- you can take an expert witness and you can go down deposition after deposition that he's given, you can use trial transcripts with an expert witness and say, Isn't it a fact that in the trial of such-and-such, you testified this way with respect to a plan for care? And you can go right down the line. You can, where information has been received, ask expert witnesses – or ask questions of expert witnesses to show that the expert witness in the case in chief, testifies the same way every single time. I've seen it, I've done it, I've seen other lawyers do it, both before I hit this posture of the courtroom and when I was sitting in your chairs.

(R. 948, pp. 17-18.) Mr. Kearl's counsel agreed. (R. 948, p. 20 ("I agree with the Court that an expert can be crossed in that manner.").)

l) Although the court found the content and questioning proper, it found the manner of presentation of the exhibit improper. (R. 948, p. 18 ("It's acceptable, but it wasn't acceptable in the way in which it was done in this case.").) Accordingly, the court granted Mr. Kearl's motion, stating: "The exhibit won't go to the jury. The information will remain." (R. 791; 847; 948, p. 18.) "[R]ather than make any more of an issue of it with the jury than has already been made," the court prohibited counsel from making any

further reference to the exhibit at trial. (R. 948, p. 21.) The court denied Mr. Kearl's request to inform the jury that the exhibit had been improperly presented, concluding that to do so would just "accentuate the concern" to the jury. The court pointed out that it was not excluding the exhibit because the information was inappropriate, but only because the handling of it was inappropriate. (R. 948, pp. 22-23.)

m) Mr. Kearl's counsel told the trial court that he did not believe the exhibit was persuasive, stating: "I don't think she made that great of a point, because pain is treated similarly no matter where it is in the body." The court replied, "If she didn't make that great of a point, then you don't need to worry about it." (R. 948, p. 22.)

n) In accordance with the court's ruling, counsel made no further mention of the exhibit, or of Dr. France's recommendations for other litigants. (R. 846.)

Facts relating to defendant's expert witness Dr. Craig Smith

David M. Ingebretsen was an expert employed by Mr. Kearl to explain the cause of the accident. On May 24, 2006, Mr. Ingebretsen inspected the subject trailer and jack, taking "photographs, measurements, and video," and examining the outward appearance of the jack as detailed in his account of its operation and functionality. (R. 311-312, 314.)

During his examination of the jack's release handle, Mr. Kearl's expert reported "some grease in the spiral groove and no apparent rust to any significant degree on the pin or other components of the locking mechanism." (R. 312.) Thereafter, Mr. Ingebretsen reenacted the accident by actuating the jack handle from a safe distance using a long metal rod. *Id.* Mr. Ingebretsen did not report damage of any kind to the jack in his first

report, nor any evidence of "malfunction in the jack." Mr. Ingebretsen concluded that it was "unlikely [Plaintiff] released the jack causing his own injuries." (R. 311.)

Three and one half months later, the trailer and jack was inspected by Dr. Craig C. Smith, an expert hired on behalf of appellee Okelberry. (R. 307-309.) In response to Mr. Ingebretsen's first report, and in light of the claims by both Mr. Kearl and Mr. Okelberry that they did not touch the jack at the time of the accident, Dr. Smith "undertook to determine if the jack might have simply dropped on its own." (R. 308.)

Dr. Smith examined the jack to "determine the reliability of the pin latch, and how easily the mechanism allows for the pins to be partially engaged such that it would release if the trailer were bumped or caused to move." (R. 308.) His report contained a number of observations relating to the design of the jack. *Id.*

Like Mr. Ingebretsen, Dr. Smith attempted to recreate the accident. He tested the jack with the pins only partially engaged and reported that "the jack held the trailer for about 5-10 minutes before dropping it when [he] began turning the jack handle to raise the gear mechanism." (R. 308.) He concluded that it was "clearly possible that the pins can be partially inserted by the spring mechanism, allowing the jack to hold the load of the trailer for some period of time, and then allowing the trailer to drop when the trailer is bumped or disturbed." (R. 307.) Dr. Smith concluded that "the most likely scenario is that the pins were not fully engaged when the trailer was unhitched and placed in the building earlier." *Id.*

Six months later, Mr. Ingebretsen again inspected the trailer, reporting that the jack had incurred damage between his first and second inspections and that, upon a second look at his photographs, it appeared that the jack had been damaged at the time of his first inspection. (R. 302-305.) Because the jack had been damaged when he looked at it earlier, Mr. Ingebretsen opined that it was also "damaged to some intermediate degree at the time of Dr. Smith's inspection," and therefore, "any conclusions Dr. Smith drew from his experiments which assumed the jack was working in the same manner as at the time of the subject accident are invalid." (R. 304.)

Mr. Kearl filed a motion in limine asking the trial court to limit the testimony of Dr. Smith on the grounds that (1) when Dr. Smith inspected the jack, it was not in the same condition as the day of the accident; and (2) Dr. Smith was not qualified to testify as to what Mr. Kearl characterized as "biomechanics" issues. (R. 282-283.) After the motion in limine deadline, Mr. Kearl filed a second motion seeking leave to inform the jury that the defendant's liability insurer, Colorado Casualty, had "hired" Dr. Smith. (R. 396-400.) Defendant Okelberry opposed both motions. (R. 323-339; 424-430.)

According to Mr. Kearl, no recording is available of the pretrial conference on October 24, 2007, at which the trial court addressed the motions. Mr. Kearl did not avail himself of the procedure provided in U.R.A.P. 11(g), under which, when a transcript is unavailable, "the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection." The court's minute entry states:

> Two motions in limine are addressed: the motion in limine regarding Dr. Craig Smith, and the motion in limine regarding Colorado Casualty. Mr. Hatch and Ms. Shapiro present their arguments.
> The Court indicates that counsel will be subject to the rule compliance. The experts may testify in accordance with those guidelines. Plaintiff may not bring in Colorado Casualty.

(R. 554-555.)

Facts relating to alleged judicial misconduct

The jury began its deliberations at approximately 5 p.m. on Friday, November 9, 2007. (R. 789, 920-924.) The deliberations lasted more than five hours. (R. 853, 918-919, 924.)

As the evening wore on, Judge Stott would occasionally visit the courtroom to update both parties on the progress or activities of the jury. For example, the judge, or his clerk, informed the parties that the jury had ordered dinner and was deliberating through their evening meal. During these updates, Judge Stott chatted informally with both counsel, discussing past experiences as a judge and in private practice. (R. 918, 923.)

As the hour approached 9:30-10:00 pm, Judge Stott again ventured into the courtroom to provide an update on deliberations. During this visit, Mr. Okelberry's counsel, her paralegal, the defendant, and the defendant's wife were in the courtroom; Mr. Kearl and his counsel were not there or in the adjacent hallway (as defendant's counsel had looked into the hallway to see if they were nearby). (R. 918, 923.)

Judge Stott and counsel exchanged pleasantries, including conversation about the late hour of the evening, the amount of time the jury was taking to deliberate, and the fact

that the jury chose to stay late on a Friday night to return a verdict instead of adjourning and returning on Monday. To the best of defense counsel's recollection, the brief conversation may have included a discussion of counsel's and Judge Stott's schedules the next week, in the event the jury decided to break for the night and resume deliberations the following Monday morning. (R. 917, 922-923.)

In the interest of receiving feedback from a respected Judge, defense counsel asked Judge Stott if he had any constructive criticism of her presentation and/or performance during trial. Judge Stott stated that he typically did not like to give feedback to counsel, but that he felt that defense counsel's closing argument was well reasoned and presented. (R. 917, 922.) Reclining on a back bench, Mr. Trevor Wenzel, the 15-year-old son of Mr. Kearl's fiancée, heard the exchange. In an affidavit, Mr. Wetzel said, "At that time Judge Stott walked over to defense counsel's table and complimented defense counsel on her work in the case and said that he thought she had a strong finish. The Judge then said, 'Good luck.'" (R. 892.)

After this brief interaction (less than three minutes), Judge Stott left the courtroom. At no point did counsel or Judge Stott discuss the merits of the pending case, substantive issues, rulings, evidentiary matters, or jury inclinations. (R. 917, 922.)

Judge Stott next entered the courtroom to inform the parties that the jury had a question regarding the verdict form. Defense counsel again went to look for Mr. Kearl's counsel who, this time, was present in the hallway. Thereafter, the jury's question was resolved in accordance with consensus from counsel and the court. (R. 917, 922.)

The next time that Judge Stott addressed counsel was approximately 20-30 minutes later when the jury reached its verdict. (R. 916, 922.) After the jury was dismissed, Judge Stott complimented both counsel on their performance, presentation, and advocacy. (R. 789, 882-884, 916, 922.)

SUMMARY OF ARGUMENT

Mr. Kearl blames everyone but himself for his loss at trial, claiming misconduct by jurors, opposing counsel, and even the trial court. On appeal, Mr. Kearl has failed to identify or argue the applicable standard of review for most or all of his complaints. Instead, his statement of issues claims that each issue is reviewed de novo, even when Utah law is clearly to the contrary. This failure to comply with U.R.A.P. 24(a)(5) with regard to such a critical issue on appeal renders his briefing inadequate.

Mr. Kearl has failed to demonstrate a basis for finding an abuse of discretion or other error by the trial court in any event. The court's claimed failure to question prospective jurors about their alcohol use and views on alcohol was within its discretion, particularly when there is nothing in the record indicating that Mr. Kearl provided authority or analysis in support of such questioning, or that alcohol would play a sufficient role at trial as to warrant an otherwise irrelevant intrusion into a juror's privacy.

Mr. Kearl's contention that he should have received a new trial because juror Gary Harward was biased is contrary to Utah law. The affidavits submitted by Mr. Kearl in connection with his motion were inadmissible in both their wording and content. Moreover, juror Harward did not, and could not, have answered dishonestly the two

questions that Mr. Kearl cited to the trial court, because they called for individual feelings and beliefs, and were asked before Mr. Harward had any information about the case or what evidence might be offered. Additionally, Mr. Harward has not shown that "correct" answers would have compelled the disqualification of Mr. Harward for cause, or that the trial court abused its discretion in denying him a new trial.

Mr. Kearl has not shown that the trial court abused its discretion in declining to grant him a new trial due to opposing counsel's perceived mishandling of a trial exhibit. Not only did the trial court find (and Mr. Kearl does not dispute) that the line of questioning and information contained within the exhibit was admissible, but the court may have concluded that the whole Exhibit 38 incident was a misunderstanding. In any event, it cannot be an abuse of discretion to sanction a party twice for the same misconduct, particularly when the court had instructed the jury to disregard the challenged content in the exhibit.

With respect to defense counsel's use of an expert's prior independent medical examination reports to cross-examine him, the court properly found that such use is common and appropriate, and he had done the same thing himself as a trial attorney. The alleged violation of someone else's privacy does not provide a basis for Mr. Kearl to obtain a new trial in a negligence case. Further, his argument is inconsistent with the rules of civil procedure, and was immaterial because counsel no identifying information about the other litigants was disclosed in counsel's questioning or the exhibit.

Mr. Kearl's argument that the trial court abused its discretion in admitting testimony by the defendant's expert is baseless. Mr. Kearl does not provide a transcript of whatever Dr. Smith's testimony was, which precludes a finding that such testimony was prejudicial. Mr. Kearl's motion to exclude the testimony would have required the trial court to make fact findings, and to resolve inter-experts disputes that were more properly for the jury. Mr. Kearl's additional argument that the jury should have been told that the defendant's expert was paid by a liability insurance company is frivolous, particularly where the jury had already been informed that he was hired by the defendant's attorney, and thus were on notice of potential favoritism.

Mr. Kearl's contention that the trial court erred in failing to instruct the jury that the consumption of alcohol can be a pre-existing condition is not only a novel approach to that concept, but is unsupported by any citation to trial testimony that would have supported such an instruction.

Finally, Mr. Kearl has not shown that the trial court erred in not recusing himself. The issue was not properly raised in the trial court, and there was no reasonable basis for claiming bias or an appearance of bias in the brief exchange that occurred between defense counsel and Judge Stott while the parties were waiting for the jury.

ARGUMENT

For logical consistency, the errors claimed by Mr. Kearl are addressed below in the order in which they allegedly occurred. Before addressing Mr. Kearl's contentions, however, appellee notes a threshold consideration regarding the standard of review.

I. KEARL'S FAILURE TO IDENTIFY APPLICABLE STANDARDS OF REVIEW SHOULD PRECLUDE APPELLATE REVIEW.

Mr. Kearl identifies four issues on appeal, and argues others in the body of his brief. Contrary to the requirements of U.R.A.P. 24(A)(5), Mr. Kearl has made no effort to identify and argue the differing standards of review applicable to each issue. Instead, he summarily states that every issue is a question of law reviewed for correctness, even such classic abuse-of-discretion scenarios as admission of expert testimony, limitations on cross examination and voir dire, and sanctions for alleged attorney misconduct. For each issue he cites the same criminal case, which did not involve any of the issues raised in this appeal. *See* Brief of Appellant, pp. 6-7 (citing *State v. Pena*, 869 P.2d 932, 935-936 (Utah 1994).)

In arguing every issue *de novo*, Mr. Kearl is unfair not only to the trial court but to the appellee and the reviewing court, who must sift through the issues, determine the actual standard of review, and then apply that standard without assistance from Mr. Kearl. The standard of review is a critical issue, particularly in a post-trial appeal. This Court has warned parties in the past of the need to comply with Rule 24(A)(5):

> This standard of review requirement [of U.R.A.P. 24] was added to our rules effective April 1, 1990, and should not be ignored. The purpose of this requirement is to focus the briefs, thus promoting more accuracy and efficiency in the processing of appeals. Due to appellant's lack of compliance with our rules on this issue, we assume the correctness of the trial court's judgment.

Christensen v. Munns, 812 P.2d 69, 73 (Utah App. 1991); *see also Spencer v. Pleasant View City*, 2003 UT App 379, ¶ 20, 80 P.3d 546 (a party who fails to provide reasoned analysis of an issue waives appellate review of the issue). Appellee respectfully submits

that Mr. Kearl's failure to address the applicable standard of review should preclude review of all issues that are subject to an abuse-of-discretion standard.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO ASK PLAINTIFF'S VOIR DIRE QUESTIONS REGARDING ALCOHOL.

As noted above, this issue has not been preserved. While Mr. Kearl did include three questions regarding alcohol in his proposed 65-question voir dire, he does not point to any place in the record where he argued his legal entitlement to the instructions. The court gave the parties an opportunity to argue voir dire (R. 554-555), and thus the issue was preserved only if Mr. Kearl can show in the record that he provided legal authority and analysis in support of his proposed questions. *O'Dea v. Olea*, 2009 UT 46, ¶¶ 15, 18-19, -- - P.3d ---- ("To properly preserve an issue at the district court, the following must take place: '(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority.'").

In any event, Mr. Kearl has failed to demonstrate an abuse of discretion by the trial court. Assuming that the court did not ask the requested questions (no transcript of the voir dire has been provided, and there is no written version in the record), Mr. Kearl has not demonstrated that declining to do so was beyond the limits of reasonableness. Before trial, the court had curtailed some lines of questioning in which alcohol might have played a role. For example, the court had granted Mr. Kearl's motion in limine to limit his ex-wife's testimony regarding the reasons for their divorce (R. 271-272, 554, 791), which, according to her deposition, had included alcohol abuse. (R. 332.)

Although the parties mentioned in pretrial filings that Mr. Kearl "self-medicated" with alcohol, nothing advised the court that alcohol would be such a prominent issue as to require the potentially invasive voir dire, particularly where there was no claim that Mr. Kearl had been drinking at the time of the accident. (Nor, without a transcript, can the Court know to what extent, or in what context, alcohol even came up at trial. Before trial, references to alcohol were limited to damages.) Under the circumstances, the court could reasonably have concluded that the proposed questioning was not sufficiently pertinent to the issues of the case, or was not sufficiently probative of bias, or would unfairly stack the deck in favor of the plaintiff. Mr. Kearl has not shown an abuse of discretion.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL BASED UPON ALLEGED JUROR BIAS.

A. The cited portions of juror Armstrong's affidavit were inadmissible.

As a threshold matter, the Court should not reach the issue of alleged juror misconduct because the supporting affidavit of Juror no. 17, Kay Armstrong, was based almost entirely upon her interpretations and assumptions and paraphrasing of undisclosed statements, and other inadmissible content. In particular:

¶ 3: *"One of the problems I saw was prejudice on the part of more than one juror."* This is not a factual assertion; it is purely conclusory, lacks foundation, and purports to speculate on the mental state of (unnamed) third parties.

¶ 4. *"[Mr. Harward] came in the jury room with his mind made up."* This assertion lacks foundation, is conclusory, and is improper speculation on someone else's alleged mental state.

¶ 5. *"[M]r. Harward could not get past the fact that Plaintiff drank alcohol and did not hold to Mr. Harward's religious standards, which he cited several times to me and once or twice to the jury, even though those facts had no relation to the injury and how it occurred."* This assertion is conclusory, lacks adequate foundation, and is improper speculation on someone else's mental state. Instead of providing an actual quotation and permitting the reader to draw inferences, she is simply offering her own perception of what was said, if anything. Even if Mr. Harward made some reference to alcohol, Ms. Armstrong does not identify the context in which he did so.

¶ 7. *"Mr. Harward kept saying that Mr. Kearl did not do what he was supposed to do, and he was in effect getting what he deserved."* The words "in effect" rendered this assertion conclusory and lacking in foundation. Ms. Armstrong (apparently) assumes this is a reference to alcohol, but without a quotation or information regarding the context, it could just as easily be, *e.g.*, a reference to Mr. Okelberry's claimed testimony that he told Mr. Kearl not to touch the trailor, and Mr. Kearl did so anyway. (R. 498.)

¶ 8. *"In essence, Mr. Harward was judging Mr. Kearl by his own religious standards and not with the evidence presented at trial."* This statement is conclusory, speculative, and lacking in foundation.

¶ 9. *"I don't think anything else made a difference to Mr. Harward. He did not at any time want to discuss with an open mind evidence presented in Court about how the injury happened."* This assertion is speculative and conclusory on its face, and improper comment on someone else's alleged mental state and whether the person was acting with what the affiant considered a sufficiently "open mind."

These assertions were nothing more than interpretations – from a dissenting juror's point of view – of a few unspecified comments over a five-hour period. They were incomplete, and lacked an indicia of reliability. Appellee Okelberry respectfully submits that Ms. Armstrong's affidavit should not be considered by the Court.

More fundamentally, affidavits that purport to disclose a juror's "opinions, surmises and processes of reasoning in arriving at a verdict" are presumptively inadmissible. *State v. Gee*, 28 Utah 2d 96, 498 P.2d 662, 665-66 (1972); *State v. Couch*, 635 P.2d 89, 96 (Utah 1981), citing *People v. Flynn*, 7 Utah 378, 384, 26 P. 1114, 1116 (1891). "[S]uch post mortems would be productive of no end of mischief and render service as a juror unbearable." *Id.*, *quoting Wheat v. Denver & R.G.W.R. Co.*, 122 Utah 418, 250 P.2d 932 (1952).

> To permit litigants to get jurors to sign affidavits or testify to matters discussed in connection with their functions as jurors would open the door to inquiry into all matters of things which a losing litigant might consider improper: misconceptions of evidence or law, offers of settlement, personal experiences, prejudice against litigants or their causes or the classes to which they belong. It would be an interminable and totally impracticable process.

Rosenlof v. Sullivan, 676 P.2d 372, 375-376 (Utah 1983), quoting *Wheat*, 250 P.2d at 937.

In view of these considerations, the Utah Rules of Civil Procedure, Utah Rules of Evidence, and Utah Supreme Court precedent narrowly prescribe the grounds upon which juror affidavits may be submitted. Affidavits relating to jury deliberations are admissible only if they aver one of three things: 1) that the verdict was determined "by chance or as a result of bribery," U.R.Civ.P. 59(a)(2); 2) that extraneous prejudicial information was improperly brought to the jury's attention, or 3) that an outside influence was improperly brought to bear upon any juror. U.R.E. 606(b).

In the court below, Mr. Kearl did not dispute these limitations, but argued that the affidavits were admissible because (1) Mr. Harward's alleged religious bias was "extraneous prejudicial information brought to bear" and/or "an outside influence," and (2) the affidavits showed that he had failed to disclose material information during voir dire (*i.e.*, that he was allegedly biased). (R. 869-871.) Neither argument has merit.

1. Under Utah law, a juror's religious belief or inspiration is not an improper outside influence.

As noted above, Mr. Kearl's counsel submitted an affidavit in which Mr. Harward said after the trial, "I don't have anything to explain. And I think I had help making the decision." (R. 805-806 ¶ 4.) Mr. Kearl assumes that Mr. Harward's reference to "help" is a reference to spiritual help. Even assuming that to be true (although it seems just as likely that he was referring to the other five jurors who agreed with him), it is well settled in Utah that a juror's belief that his vote was divinely inspired does not constitute "improper influence" being brought to bear upon him. *State v. DeMille*, 756 P.2d 81, 84

(Utah 1988); *see also State v. Tolman*, 775 P.2d 422, 426-27 (Utah App. 1989) (juror affidavits regarding divine revelations do not fall within the exception set forth in Rule 606(b); court properly refused to consider juror's affidavit).[6]

2. Mr. Kearl did not meet his burden of showing that Mr. Harward provided false information.

Mr. Kearl is correct that if a party has shown that a juror provided false information in voir dire, affidavits may be introduced to show whether that information was brought to bear in the deliberative process. *State v. Thomas*, 830 P.2d 243, 245 (Utah 1992). "All other proof as to what was said or done in the jury room, including evidence that the jury was confused or that it misunderstood or disregarded the facts or the applicable law, is inadmissible as violative of the long-standing policy against attempts to undermine the integrity of verdicts." *Groen v. Tri-O-Inc.*, 667 P.2d 598, 603 (Utah 1983) (testimony that verdict was based on incorrect assumptions of insurance coverage was "inadmissible and incompetent as a basis on which to grant a motion for a new trial").

In this case, however, no reasonable argument can be made that juror Harward made misrepresentations or omissions in voir dire. Mr. Kearl's motion for new trial was limited to a claim that Mr. Harward answered falsely two questions on the Prospective

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[6] As the Supreme Court has observed, "construing 'outside influence' to include responses to prayer could well infringe upon the juror's religious liberties." *Tolman*, 775 P.2d at 427, *citing DeMille*, 756 P.2d at 84. The Utah constitution, for example, prohibits disqualification of a juror for his religious beliefs. Article I, § 4.

Jury Questionnaire. (R. 818-819.) He did not claim any falsity or omission in Mr. Harward's answers to any of the questions put to him by the trial court. *Id.*[7]

Whether a juror answered a question honestly is a question of fact determined by an objective standard. *Thomas*, 830 P.2d at 245-246. As a matter of law, however, a juror cannot be deemed to have failed to answer a question honestly "if the juror was not asked a question regarding the subject matter alleged to have gone undisclosed." *Id.* Under Utah Supreme Court precedent, the information must have been specifically requested before a non-disclosure can be found. *Id.*, citing *Hard v. Burlington Northern R.R.*, 870 F.2d 1454, 1460 (9th Cir. 1989) (juror who was asked whether he was ever employed by defendant railroad not required to reveal he was former employee of predecessor railroad); *United States v. Aguon*, 851 F.2d 1158 (9th Cir. 1988) (juror who was asked only general question regarding his ability to be impartial not required to reveal that he was under investigation for situation similar to that of the defendant); and *United States v. O'Neill*, 767 F.2d 780, 784-85 (11th Cir. 1985) (in trial for various drug

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[7] On appeal, Mr. Kearl abandons this argument, and instead raises a new contention that Mr. Harward answered falsely in one-on-one questioning when he said he could be fair and impartial. *See* Brief of Appellant, pp. 20-21. However, the trial court's exercise of discretion must necessarily be judged based upon the arguments that were presented to it. In any event, this contention suffers from the same defect as his original argument, which is that there is no indication that Mr. Harward was not telling the truth about his intent to be fair and impartial. At this time, he still did not know anything about the case, or what evidence would be presented.

offenses, juror never asked if he had any friends in law enforcement not required to reveal that he had two friends who were narcotics agents) (parenthical summaries verbatim).

In this case, Mr. Kearl did not identify a specific factual inquiry that Mr. Harward answered dishonestly, or that even *could* be answered dishonestly. The Questionnaire was completed by the jury pool before they knew anything about the case other than that it probably involved an accident of some sort. Mr. Harward disclosed that he had been injured in an auto accident himself, and that he favored the filing of lawsuits if needed as a means of resolving disputes, both of which favored Mr. Kearl. (Questions 7 and 12; *see* R. 948, pp. 3-4.)

Mr. Kearl argues that, without knowing what the lawsuit involved or that alcohol would even be mentioned, Mr. Harward should have been prescient enough to volunteer that, by the way, he (allegedly) disapproves of persons who drink. Under that reasoning, should he have also volunteered that he doesn't like dog people, or people who ride motorcycles, or everything else he could think of in case it came up at trial? Mr. Kearl's criticism of Mr. Harward is baseless.

In *West v. Holley*, 2004 UT 97, 103 P.3d 708, cited by Mr. Kearl, a juror answered no to the specific, objectively verifiable question of whether she had ever been involved in a lawsuit. The juror later admitted that she had been the subject of a contract lawsuit and workers' compensation claims that she considered spurious, and that she should have disclosed those experiences. *Id.*, ¶ 6.

In this case, by contrast, the only questions cited by Mr. Kearl were general inquiries about Mr. Harward's "belief" or "feeling," purely subjective perceptions. Question No. 8 on the Prospective Jury Questionnaire asked: "Do you believe you have a valid reason that would make it difficult for you to serve as a juror? If necessary, the Judge can discuss this with you privately." Question No. 10 asked: "If you were in the position of either party, would you feel comfortable with yourself as a juror? If not, please explain." Mr. Harward answered, "Yes." (Emphasis added on both questions.)

Even if the affidavit of Ms. Armstrong were considered, her allegation that Mr. Harward had formed a negative opinion of Mr. Kearl by the time the trial ended does not mean that his answers were false when he filled out the questionnaire, before he knew anything about Mr. Kearl or his claims. The jurors had sat through a week of trial. It would hardly be surprising if one or more of them had formed opinions as to liability by the time it was over—indeed, it would be surprising if they hadn't. Anyone who has ever had a jury come back in 45 minutes knows that many jurors form opinions by the time they are sent out to deliberate.

A juror also cannot be deemed to have answered dishonestly unless a question is unambiguous. *Thomas*, 830 P.2d at 246. Question 8, asking if the juror believes he has a valid reason that would make it difficult to serve, is usually designed to elicit whether some logistical problem exists that would make service difficult, such as a medical condition, a non-refundable plane ticket, etc. The meaning that Mr. Kearl ascribed to this question was unusual, and certainly not the only reasonable construction. With respect to

Question No. 10, before hearing any evidence and without knowing what the case was about, Mr. Harward opined that he would feel comfortable with himself as a juror. How can that be false? The question calls for an emotion, a purely speculative prediction.

Mr. Harward was not asked during *voir dire* his views on alcohol (which was within the trial court's discretion, see Point I, *supra*), or other issues that might or might not implicate someone's religious beliefs. No argument can be made that his answers to Questions 8 or 10 were dishonest. Absent that threshold showing, the affidavits regarding jury deliberations are inadmissible, and should not be considered on review.

B. Mr. Kearl has not met his burden of showing an abuse of discretion for denial of a new trial on the grounds of juror misconduct in any event.

Utah has adopted the "McDonough" test for resolving allegations of misconduct based on a juror's alleged misstatements or omissions during *voir dire*. *State v. Evans*, 2001 UT 22, ¶ 25, 20 P.3d 888, citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). Under *McDonough*, a party alleging such grounds must show that (1) a "juror failed to answer honestly a material question on voir dire," and (2) "a correct response would have provided a valid basis for a challenge for cause." *Id.*

The first issue, whether a juror failed to answer honestly a material question on voir dire, has been addressed above. No such showing can be made. Under *McDonough*, the inquiry goes no further. In any event, though, Mr. Kearl has not established that either question was material, or that a "correct" answer would have compelled the striking of Mr. Harward for cause.

According to Ms. Armstrong's affidavit, other jurors – including herself – were fully able to express their views during deliberations. Five other jurors agreed with Mr. Harward that the defendant was not negligent. Mr. Kearl's alleged bias against the alcohol consumption involved a damages issue, which the jury did not reach. The trial court indicated that it was not persuaded that Mr. Harward's alleged behavior impacted Mr. Kearl's ability to have a fair trial. (R. 13-16.) Mr. Kearl has not demonstrated that the trial court abused its discretion in denying his motion for a new trial on this ground.

IV. MR. KEARL HAS NOT SHOWN AN ABUSE OF DISCRETION IN THE TRIAL COURT'S RULINGS REGARDING ALLEGED ATTORNEY MISCONDUCT REGARDING EXHIBIT 38.

On appeal, Mr. Kearl raises three arguments as to why he was entitled to a new trial with respect to the infamous Exhibit 38. First, he claims that the exhibit was not timely disclosed. Second, he claims that the exhibit violated the privacy of third parties. Third, he claims that defense counsel "deceived" the trial court with respect to the content of the exhibit. None of these arguments has merit.

As to timeliness of the disclosure, the trial court specifically noted that it had raised a concern with both parties about untimely disclosures. It was fully aware of the history of the proceedings, and was in a unique position to assess the reasonableness and fairness of allowing use of the exhibit. Signficantly, no claim is (or can be) made that the line of questioning itself had to be disclosed in advance, but only the summary of those questions on the exhibit.

Mr. Kearl's suggestion that his witness looked unprepared is not borne out by the record cites. Dr. France, a seasoned expert, did not fumble and appear unable to answer. Rather, the transcript reflects that he reviewed the material provided and answered that, as far as he could tell, it was correct. He then explained why the recommendations for all three litigants were similar. Mr. Kearl had a chance to rehabilitate him.

No prejudice can be shown in any event, because the exhibit pertained only to damages, which the jury did not reach. *See Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶¶ 33-34, --- P.3d ---- (any errors involving negligence instructions were harmless where jury did not reach the issue of negligence). Mr. Kearl's claim that his counsel was made to look like a bumbler while defendant's counsel appeared to have "Perry Mason like" command of the courtroom is wild speculation, especially when the jury was later told that Exhibit 38 had been eliminated. Mr. Kearl's counsel stated at the time that he did not think defense counsel had made a very good point with the exhibit. (R. 948, p. 22.) If that is true, how was Mr. Kearl materially prejudiced by it?

As the trial court pointed out, and as Mr. Kearl's counsel admitted, Exhibit 38 did nothing more than summarize other evidence that was properly admitted. *See, e.g., Schmidt v. Intermountain Health Care*, 635 P.2d 99, 102 (Utah 1981) (fact that medical record containing same information as objectionable testimony had been admitted supported trial court's discretion in denying motion for new trial). The court concluded that the information beneath the sheet was appropriate cross-examination material. (R. 948, p. 23.) It is not an abuse of discretion to deny a new trial for allegedly improper

handling of an otherwise proper exhibit. *See, e.g., Estate of Russell v. Russell*, 852 P.2d 997, 998-999 (Utah 1993) (trial court has "considerable discretion" in determining the mode and manner of presentation of evidence).

The trial court had already sanctioned defense counsel once for the perceived misconduct, withdrawing Exhibit 38 and instructing the jury that "you are to disregard any of the information from [the exhibit] it except as to what Dr. France testified to concerning Mr. Kearl only." *See State v. Wetzel*, 868 P.2d 64, 70 (Utah 1993) (no prejudicial error where court instructed jury to disregarded information); see also U.R.Civ.P. 37(f) (authorizing court to impose sanctions for failure to disclose as listed in U.R.Civ.P. 37(b), including barring use of material at trial). There is no basis in the Rules of Civil Procedure, and obvious due process concerns are raised, by a request to sanction defendant a second time for the same conduct.

It also cannot be considered an abuse of discretion to deny a new trial when it had been shown to the trial court that the "deception" perceived by the court was partly an acoustical mishap. The court could reasonably have concluded that, notwithstanding its (understandable) ire at what it thought was a deceptive failure to disclose, counsel had not acted in bad faith such as to warrant additional sanctions, particularly the extreme sanction of a new trial (or, as Mr. Kearl's counsel also requested, a finding that Ms. Shapiro had "committed a crime").

Mr. Kearl's related claim that he should have received a new trial because the exhibit violated the privacy of third parties is without merit. Mr. Kearl does not explain

how he has standing to seek affirmative relief for the alleged violation of someone else's privacy right. (For example, HIPAA does not provide a private cause of action even to the subject of a record, *Acara v. Banks*, 470 F.3d 569, 571-572 (5th Cir. 2006), and numerous cases cited. It would seem anomalous to let a violation provide a basis for relief in someone else's negligence case.)

None of Mr. Kearl's arguments regarding patient privacy, etc., have any relevance on appeal, because the trial court found that, not only would Ms. Shapiro be entitled to have the type of record at issue (prior reports of an expert), but that Exhibit 38 did not contain identifying information about the third parties. This is borne out by Mr. Kearl's own averment that, had it not been for unredacted copies of underlying documentation provided by Okelberry's counsel, his counsel would not have known whom to contact, even though he saw the exhibit and one of the subjects was his own client. (Brief of Appellant, p. 30 n.5.)[8]

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[8] Mr. Kearl also complains about defense counsel's very act of giving unredacted copies of the underlying documentation to him and the court. No objection was made at the time, and it is difficult to see how one could object. Absent an order otherwise, opposing counsel and the court are always entitled to see the full text of documents shown to a witness.

Additionally, Mr. Kearl's suggestion that it is improper for counsel to obtain other reports by experts seems inconsistent with U.R.Civ.P. 26, which requires disclosure of all cases in which an expert has been retained for the past four years. One obvious purpose of this requirement is to allow a party to get copies of the expert's opinions in those other cases for cross-examination. That is particularly true since litigants for whom an expert performs an independent medical examination are not "patients" of the expert. *Joseph v. McCann*, 2006 UT App 459, ¶ 15, 147 P.3d 547.

For any and all of the above considerations, Mr. Kearl has not shown that it was an abuse of discretion to deny a new trial on grounds associated with Exhibit 38.

V. MR. KEARL HAS NOT SHOWN AN ABUSE OF DISCRETION IN THE TRIAL COURT'S RULINGS REGARDING EXPERT WITNESS CRAIG SMITH.

A. Mr. Kearl cannot challenge the admission of testimony at trial when he has failed to provide a record of what that testimony was.

Mr. Kearl argues that the trial court erred "by allowing Dr. Craig Smith to testify, and by not allowing Plaintiff to tell the jury that Colorado Casualty Insurance hired defense expert Dr. Craig Smith[.]" (Brief of Appellant, p. 7.) Mr. Kearl has not provided a transcript of Dr. Smith's testimony, however, precluding any claim of prejudicial error. *See Kelson v. Salt Lake County*, 784 P.2d 1152, 1157 (Utah 1989) (rejecting claim of error in admitting testimony; "In taking his appeal, Kelson failed to designate the trial transcript as part of the appellate record. In the absence of a transcript, it is impossible for us to ascertain whether, assuming an error was committed, a 'substantial right' has been affected").[9]

B. No abuse of discretion can be shown.

In any event, Mr. Kearl has not shown that the trial court abused its discretion in allowing Dr. Smith to testify. The basic premise of Mr. Kearl's motion in limine, and his

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[9] If Mr. Kearl assumes that Dr. Smith testified as to everything in his report or deposition, that is obviously unrealistic. Reports and depositions set the boundaries of testimony; they do not define it. The trial court had ruled that experts could testify "subject to the rule compliance . . . in accordance with those guidelines." (R. 554.) That suggests that the trial court planned to determine the scope of questioning at the time of trial.

argument on appeal, is that the jack had been heavily used and was beaten up by the time Dr. Smith examined it, whereas it was new at the time of the accident.

There were several grounds upon which the trial court could reasonably have rejected Mr. Kearl's contention. First, the court may have considered the fact that the jack was several years old at the time of inspection because Mr. Kearl waited almost four years after the accident to file suit (R. 2-3). The court could reasonably have considered it unfair for Mr. Kearl to create a circumstance through delay, then try to take advantage of that circumstance by preventing the defendant from offering expert testimony.

Mr. Kearl's argument also suffered from the inconvenient fact that his own expert inspected the same beaten up jack in preparing his own report just three months earlier. Although Mr. Kearl sought to excuse his expert's reliance on the used jack by claiming that he had focused more on design, Mr. Okelberry pointed out to the court that Dr. Smith also addressed design. (R. 486-487.) The trial court could reasonably have concluded that it was better to allow both experts than to strike both experts, particularly when each expert was fully prepared to point out the flaw in his counterpart's report.

Mr. Kearl's motion would also have required the trial court to resolve factual issues. For example, the court would have had to accept defendant Okelberry's testimony about the condition of the jack at the time of the accident, while Mr. Kearl was insisting that Mr. Okelberry's testimony as to other facts should be rejected (*e.g.*, Mr. Kearl's location at the time of the accident, how the accident occurred). Mr. Kearl's motion would also have required the trial court to ignore the fact that Mr. Kearl's expert had not even mentioned

damage in his initial report, suggesting that the jack was not as damaged as Mr. Kearl later argued, or that the damage was immaterial to an expert's ability to form opinions in the case. It is not an abuse of discretion to let such disputes be heard by the jury.

The same is true as to any testimony that Dr. Smith may have given that Mr. Kearl felt strayed beyond his expertise. While Mr. Kearl incorrectly states Dr. Smith's background in the field (he had taken three courses in addition to his research), it is within a trial court's discretion to allow such challenges to be presented through cross-examination, rather than barring a line of questioning before the court has even heard the questions.

On appeal, Mr. Kearl largely rehashes his pretrial arguments as to why his expert's conclusions were more sound than those of Mr. Okelberry's expert. While such contentions provide excellent cross-examination fodder, it was not an abuse of discretion to allow the jury to hear competing views. Mr. Kearl suggests, however, that the trial court has no discretion to allow testimony unless the party can prove that the product was in the same condition as the time of the accident. Notably, however, cites no Utah authority to that effect, and most of Mr. Kearl's cases involve the specialized area of product liability, in which the existence of a defect at the time of sale is a required element. Moreover, in those cases, the appellate court held only that the trial court did not abuse its discretion in deciding whether the testimony came in. It still comes down to discretion, and Mr. Kearl has not shown any abuse here.

Mr. Kearl's second argument regarding Dr. Smith is baseless on its face. In a rather patent attempt to inject liability insurance into the trial, Mr. Kearl argued that he should be

allowed to tell the jury that the defendant's expert witness was "hired" by his liability insurance company.[10]

Mr. Kearl's argument makes little sense, and does nothing to prove an abuse of the trial court's discretion in concluding that such testimony, even if probative, would be outweighed by its prejudicial effect. If Mr. Kearl is suggesting that a jury would not realize a potential for bias by a party's expert unless they are told that a liability insurer is paying him, that is perplexing. The jury was told that the expert had been hired *by Mr. Okelberry's attorney*. (R. 948, p. 36.) Jurors are not stupid; they would obviously know that the defendant's attorney would not have hired the expert unless she thought his conclusions would help the defendant's case. Mr. Kearl's own cases indicate the lack of prejudicial effect when the jury already knows of a relationship with counsel. *See, e.g., Herbold v. Ford Motor Co.*, 310 Ky. 697, 221 S.W.2d 646 (1949) (error in precluding testimony that witness was employed by insurance company was harmless, where witness disclosed that he worked in the office of defense counsel).

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[10] Mr. Kearl offered no factual support for that contention, which is inaccurate. As his counsel should know, having come from a former insurance defense firm (the firm at which Ms. Shapiro is now employed), an insurance company may *pay* for an expert, but it is the attorney who makes decisions regarding her client's case and hires the expert.

VI. MR. KEARL HAS NOT ESTABLISHED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING HIS JURY INSTRUCTIONS REGARDING ALCOHOL USE AS A PRE-EXISTING CONDITION.

As noted above, the plaintiff proposed a jury instruction (R. 584) in which the trial court would had instructed the jury that use of alcohol could be a pre-existing condition. The record does not show a citation to any legal authority by Mr. Kearl for this proposed instruction, which waives review. *Id.*

The Court need not address Mr. Kearl's argument regarding this instruction in any event because it was proposed in connection with, and pertained solely to, damages. (*See* R. 583-591; #11 "Introduction to tort damages"; #12 "Proof of damages"; #13 "Economic damages defined"; #14 "Non-economic damages defined"; etc.) The jury did not reach damages.

Additionally, Mr. Kearl has not attempted to meet his burden of showing that competent evidence was adduced at trial that would support such an instruction. *See* p. 5, *supra* (party is entitled to instruction only if competence evidence at trial supports it). His failure to provide a trial transcript is fatal to this claim.[11]

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[11] In the absence of a transcript, the trial court's rationale for denying the instructions is unavailable to this Court. However, for what it is worth, the court's copy of Plaintiff's Proposed Jury Instructions happens to contain handwriting that appears to be that of the judge or his clerk. With respect to the alcohol-as-pre-existing condition and related instructions, the handwriting says, "What were pre-exh-cond, if any?" (Instruction 18, R. 584) and "Not given – no evidence of this." (Instruction No. 19, R. 583.) Although this handwriting cannot substitute for a transcript of the jury instruction conference, it may

Finally, Mr. Kearl's proposed instructions would have constituted improper comment on the evidence (assuming that any evidence was adduced). A jury instruction explains the law; it was up to Mr. Kearl's counsel to explain application of that law to his client's theory of the case. It would have been improper for the trial court to endorse counsel's rather novel view of "pre-existing condition" by giving the instruction as written.

VII. THE TRIAL JUDGE DID NOT ABUSE ITS DISCRETION IN FAILING TO RECUSE HIMSELF SUA SPONTE.

As noted above, three months after the alleged improper conduct, and two days after Judge Stott announced an intent to deny Mr. Kearl's motion for new trial, Mr. Kearl filed a motion to disqualify the judge. Mr. Kearl takes offense at appellee's suggestion that this timing is not coincidental, but actions speak louder than words. It is hard to draw any other inference from this temporal proximity, particularly when Mr. Kearl specifically requested that his motion for new trial be reargued before a different judge. (R. 895.)

The standard of review for this issue is not entirely clear. First, it is not clear that there was a ruling, or that there was required to be. Although Mr. Kearl made a motion to disqualify, he withdrew that motion before any action by the court was due. It was only in the body of his Withdrawal that he suggested that the judge recuse himself. That does not seem to be a proper method of bringing an issue to a trial court's attention. Under this analysis, there was no preservation, nothing to rule on, and no issue for review.

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reinforce the conclusion that the instructions were disallowed because Mr. Kearl failed to adduce evidence to support them.

If one assumes that the trial court was obligated to, and/or did, rule on the suggestion of disqualification, the standard of review is still unclear. There is, again, nothing to review if the disqualification was not pursued timely. *Madsen v. Prudential Fed. Sav. & Loan Ass'n*, 767 P.2d 538, 543 (Utah 1988); *see also* U.R.Civ.P. 63 (setting forth procedure for motions to disqualify).

In the court below, Mr. Kearl admitted that his motion was untimely. (R. 928) ("Plaintiff hereby withdraws his motion to enter disqualification because it was not filed timely.").) Moreover, it is well established in Utah that a party who continues to participate in proceedings, and/or seeks affirmative relief from a court, after learning of alleged grounds for disqualification waives any right to challenge the judge's continued participation. *Lunt v. Lance*, 2008 UT App 192, ¶¶ 12, 15, 186 P.3d 978 (parties waived disqualification under Canon3(E)(1)(a) when they did not object to judge's continued involvement after learning of potential grounds for disqualification), and cases cited.

In the month after the exchange at issue occurred, Mr. Kearl sought a new trial from Judge Stott based in large part on the Exhibit 38 incident, seeking to capitalize upon Judge Stott's dismay with defense counsel regarding that incident by quoting the judge's chastisement of counsel back to him. (R. 861.) A party cannot make a strategic decision to forego a motion to disqualify, and then belatedly file one if his strategy fails. As the Utah Supreme Court has stated:

> *A party who has a reasonable basis for moving to disqualify a judge may not delay in the hope of first obtaining a favorable ruling and then complain only if the result is unfavorable.* Not only is such a tactic unfair, but it may evidence a belief

> that the judge is not in fact biased. Furthermore, delay imposes unnecessary disruption on both the judicial system and litigants. A disqualification proceeding is a collateral attack on the substantive action, it disrupts orderly litigation, and it necessarily results in significant additional costs to the parties. Accordingly, a party must move with dispatch once a basis for disqualification is discovered.

Madsen at 542 (emphasis added). *See also* 13A *Federal Practice and Procedure* § 3551 (footnote omitted) ("[t]he affidavit will be considered untimely [under federal rules] if the affiant, after knowledge of the facts showing the supposed bias, has sought the court's affirmative action in his behalf before filing the affidavit"); *Franks v. Nimmo*, 796 F.2d 1230, 1233-34 (10th Cir. 1986) (affirming trial court's denial of a motion to recuse based in part on plaintiff filing a motion for partial summary judgment after he knew of the facts upon which he based his motion to recuse, but before he actually filed it).

Even if the issue of disqualification had been properly and timely raised with the trial court, Mr. Kearl's motion lacked merit. With respect to this issue, the Court has stated that, "determining whether a trial judge committed error by failing to recuse himself is a question of law, and we review such questions for correctness." *State v. Tueller*, 2001 UT App 317, 37 P.3d 1180. However, in that same case, the Court recognized that the trial court has greater knowledge regarding facts relating to the conduct of trial. *Id.*, ¶ 12 (rejecting claim of bias; deferring to trial court's advantage in assessing impact of courtroom activity).

In the context presented by this case, the appropriate standard would appear to be abuse of discretion. *See, e.g.,* D. Goldberg, et al., "The Best Defense: Why Elected Courts Should Lead Recusal Reform," 46 WASHBURN L.J. 503, 518 ("Nearly every

appellate court, state and federal, will overturn a lower court's disqualification or recusal decision only for an 'abuse of discretion.'"). For example, one of Mr. Kearl's arguments on appeal is that a reasonable appearance of bias could have arisen because Judge Stott had shown bias against him throughout the trial. Particularly without a transcript, how could this Court address that contention *de novo*?

The trial judge knows the history of a case, of the parties' prior dealings with each other and with the court, on and off the record, and observes the demeanor of everyone in the courtroom, including himself. If there has been no claimed impropriety in two years of litigation and five days of trial, it should be within a court's discretion to assess whether a three-minute conversation while the jury was out could override all of that history and create a "reasonable" appearance of bias.

In any event, Mr. Kearl's motion for disqualification was legally insufficient. Rather misleadingly, Mr. Kearl (repeatedly) states that Judge Stott "held an ex parte meeting" with defendant's counsel "to compliment Defense Counsel on her work in the case, to state that he thought she had a strong finish, and to wish her good luck." Mr. Kearl derides the court as engaging in a "buddy-buddy" moment in which he "sang the praises" of defense counsel.

If one is going to accuse a judge of misconduct, he should at least be fair enough to articulate the claimed misconduct objectively, and then argue it. Judge Stott did not "hold a meeting" with counsel for the purpose claimed by Mr. Kearl. The affidavits of Ms. Shapiro and Mr. Wenzel confirm that several hours into jury deliberation, a minor

exchange occurred in the courtroom that was impromptu, innocuous, and could not create a reasonable perception of bias.

Waiting for a jury can be boring for tired parties and their counsel. Judge Stott attempted to make the wait a little less excruciating with a brief show of politeness, chatting informally with both lawyers, telling stories about his days in practice, etc. (R. 923.) Mr. Wenzel himself noted that, before the judge came out of chambers on the occasion in question, he had himself been chatting with defendant's counsel about sports.

As Mr. Wenzel's affidavit suggests, his presence in the courtroom when Judge Stott came out was not a surprise to Ms. Shapiro, since he had just finished chatting with her when he went to lie down on a bench to text message a friend. At most, Mr. Wenzel says that Judge Stott "complimented defense counsel on her work and said that he thought she had a strong finish," and concluded the exchange with, "Good luck."[12]

Based upon that interaction, Mr. Kearl launched a bizarre personal attack on the trial court, stating, "Plaintiff does not know if the Court was attracted to defendant's counsel, to defendant himself, or to defendant's cause." (R. 896.) Whether judged by abuse of discretion or de novo, it could not have been error to disregard such a ridiculous

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[12] Mr. Wenzel says that "I don't think the Judge saw me because at the time he came to defense counsel I was laying in a bench in the audience section of the courtroom," which seems inconsistent with Mr. Wenzel's indication that he saw the judge walk over to the table.

accusation, which was not supported by the affidavit of Mr. Kearl's own witness. Indeed, Judge Stott later complimented both counsel on their advocacy. (R. 922).

Concluding a brief conversation with "good luck" is nothing more than a social platitude. Anyone who has ever heard a half-time interview during a televised sporting event knows that they all end with a casual "good luck," regardless of who is being interviewed. No one would suggest that the reporter is evidencing bias toward a particular player or team. The same thing occurs regularly in every day conversation.

Mr. Kearl does not claim, or attempt to show "how, absent the judge's comments, the result would have been different." *Tueller*, 2001 UT App 317, ¶ 14. As the Utah Supreme Court has observed:

> The traditional judicial view is that if a judge can be disqualified for bias following a comment or ruling during the court proceedings, there is no limit to disqualification motions and there would be a return to 'judge shopping.' Any judicial comment or ruling gives the appearance of partiality in the broadest sense to the adversely affected party. . . . As long as the judge decides the case only after all the evidence is submitted, there appears to be no harm in such a comment. Such judicial comments made before a jury would constitute an improper expression of opinion on the evidence, but those statements made out of their hearing do not require recusal. As long as a judge does not allow the "propensities" to obscure the evidence and will decide the case only after all the evidence is heard, then disqualification is generally not warranted by a judge's comments.

Madsen at 546, citing L. Abramson, JUDICIAL DISQUALIFICATION UNDER CANON 3C OF THE CODE OF JUDICIAL CONDUCT 11-12, 23 (1986).

Although no bias could reasonably be claimed from the brief interaction, any such bias would not have compelled disqualification in any event. The Supreme Court has held that, in order for bias to rise to the level of disqualification, it must be personal, not

judicial. "In other words, the bias or prejudice must usually stem from an extrajudicial source, not from occurrences in the proceedings before the judge." *In re Young*, 1999 UT 81, ¶ 35, 984 P.2d 997.

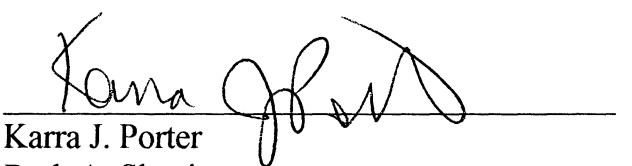
The weakness of Mr. Kearl's argument for disqualification is perhaps best illustrated by the *Young* case, upon which Mr. Kearl heavily relies. In that case, Judge Young called one party to a lawsuit and, *inter alia*, stated his view of another party's pending motion for attorney fees. The Utah Supreme Court held that this *ex parte* communication was inappropriate and sanctionable – but that it did not require disqualification. *See id* at ¶¶ 34-36.

CONCLUSION

For the reasons set forth above, appellee Okelberry respectfully requests the Court affirm the judgment of the trial court.

RESPECTFULLY SUBMITTED this 10th day of August, 2009.

CHRISTENSEN & JENSEN, P.C.



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CERTIFICATE OF SERVICE

This is to certify that on the 10th day of August, 2009, two true and correct copy of the foregoing BRIEF OF APPELLEE were mailed, first-class postage prepaid, to:

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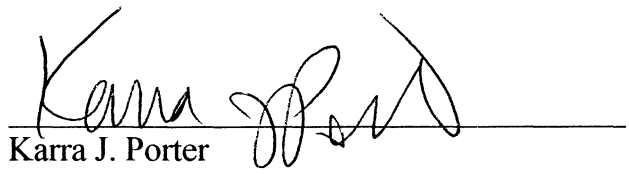

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